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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

EXPORTADORA DE SAL, S.A. DE C.V.,
Petitioner,

v.

HIROKO SUGIMOTO, et al.,
Respondents,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE UNITED MEXICAN STATES IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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EDITOR'S NOTE

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QUESTIONS PRESENTED

Amicus curiae adopts the questions presented for review as they appear in the petition for a writ of certiorari filed by Exportadora de Sal, S.A. de C.V. (Exportadora), with the following addition:

Whether an agreement between the Government of Mexico and the Government of Japan for technical cooperation, which requires Mexico, when receiving scientists, to provide transportation and accommodations, makes the provision of such transportation under the direction of Mexico "public" acts that are immune from jurisdiction in the United States?

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BRIEF OF AMICUS CURIAE UNITED MEXICAN STATES IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, the United Mexican States (Mexico) respectfully submits this brief amicus curiae in support of the petition for a writ of certiorari filed by Exportadora. Consent to the filing of this brief has been granted by counsel for both parties. Copies of the letters of consent have been lodged with the Clerk of this Court as part of Mexico's Appendix.

Mexico is the majority shareholder of Exportadora. The respondents are all Japanese citizens, and are the survivors of three passengers who died in an aircrash which led to this wrongful death action. Exportadora is a foreign sovereign under the Foreign Sovereign Immunities Act of 1976 (FSIA) (28 U.S.C. §§ 1330, 1603 et seq.), and, as such, is presumptively immune from jurisdiction in the United States unless one of the exceptions to immunity applies.

Jurisdiction originally was challenged by Exportadora in response to the complaint. The motion to dismiss was denied, and Exportadora timely filed an interlocutory appeal with the Ninth Circuit under the collateral order doctrine. The court of appeals held that jurisdiction existed under the "commercial activities" exception of the FSIA (28 U.S.C. § 1605(a)(2)) and affirmed the district court's denial of Exportadora's motion to dismiss. Schoenberg v. Exportadora de Sal, S.A. de C.V., 930 F.2d 777 (9th Cir. 1991) (Schoenberg).

The case proceeded to trial with only the survivors of the Japanese passengers, Sugimoto, Kodani and Omachi, after two of the plaintiff groups who are the survivors of the two California passengers settled their claims. Following trial, judgment was entered against Exportadora, leading to the second appeal. Again, the Ninth Circuit found jurisdiction under the commercial

activities exception, this time on a different basis. Sugimoto v. Exportadora de Sal, S.A. de C.V., 19 F.3d 1309 (9th Cir. 1994) (Sugimoto).

Under Article 28 of the Mexican Constitution, the profits which the Mexican government derives from Exportadora's operation belong to the people of Mexico. Mexico assert's the right of its people to determine how these public resources are to be spent.

Mexico also is a member of the family of nations and as such has an interest in upholding international law. Mexico firmly believes that its departments and public corporations should not be subject to the jurisdiction of United States courts except under principles consistent with customary international law. Mexico respectfully submits that the Ninth Circuit has carved out a new exception to the principle of sovereign immunity which is not consistent with international law as codified in the FSIA.

The Ninth Circuit has created this new exception by grafting tort principles, in particular those of vicarious liability, onto the commercial activities exception, (28 U.S.C. 1602(a)(2)), with the extraordinary result of finding a Mexican public corporation vicariously liable for the tortious conduct of a private corporation solely because of remotely related and relatively insignificant commercial activity in this country.

Mexico believes the Ninth Circuit's imputation of jurisdiction based on a finding of vicarious liability erodes one of the primary purposes of the FSIA, which was to establish a uniform body of law needed because of the potential sensitivity of actions against foreign sovereigns. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 489, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983), citing House Report No. 94-1487, p.32 (1976). The Ninth Circuit's approach requires courts to first

determine liability before jurisdiction can be considered, contrary to the FSIA which states that liability is considered only in instances where the foreign state is not entitled to immunity. 28 U.S.C. §1606.

Perhaps most important, Mexico finds the circumstances of this case prevented the introduction of evidence that would conclusively establish Exportadora was engaged in immune "public" activity, not commercial activity, as to two of the three passengers. The passengers were being transported by Exportadora at the instruction of the Government of Mexico, which instruction was made pursuant to an agreement between Mexico and Japan pledging technical cooperation between the governments and, complimentary travel and accommodations for Japanese experts while in Mexico. The agreement was signed on December 2, 1986, in Tokyo and was published in Mexico's federal register ("Diario Oficial") on April 25, 1988.

Although Exportadora argued that it had been directed to transport the scientists on behalf of Mexico when its original motion to dismiss in Schoenberg was denied, the formal agreement was not known to Exportadora at the time. However, Exportadora was later deprived of the opportunity to introduce the agreement at trial in Sugimoto, because the district court refused to revisit jurisdictional issues.

Finally, Mexico submits that the Ninth Circuit applied American concepts of insurance and liability to a Mexican corporation, which could not have insured itself against this risk in Mexico. Part of the Ninth Circuit's finding of vicarious liability was based on the holding that "the enterprise...is free to insist upon [a contractor] who is financially responsible, and to demand indemnity from him." Sugimoto, 19 F.3d at 1312. Amicus informs this Court that Aviones carried the insurance required by Mexican law, and paid benefits to some of

the same plaintiffs who have sought additional compensation in the courts of this country. These considerations have no application to a Mexican public corporation which could not have insisted on a carrier having more financial responsibility than Aviones. Mexico respectfully finds the Ninth Circuit's comments insensitive to the laws of a sovereign nation.

Because of the foregoing interests and concerns, Mexico believes that Exportadora was improperly subjected to jurisdiction in the United States, and that the case properly should have been brought in Mexico.

SUMMARY OF ARGUMENT

The FSIA provides the exclusive means for acquiring jurisdiction over foreign sovereigns in United States courts. An exception to the immunity presumed by the FSIA is necessary for both personal and subject matter jurisdiction.

In initially challenging jurisdiction, Exportadora argued that transporting two scientists from Japan at the instruction of the Government of Mexico was a public act outside the commercial activities exception. The district court and the Ninth Circuit on Exportadora's interlocutory appeal disagreed, and held that Exportadora was appeasing its majority shareholder, which the courts found not to be an inherently public act.

After the interlocutory appeal but before trial, Exportadora learned of an agreement that had been entered into between Japan and Mexico. The agreement requires Mexico to provide transportation for experts from Japan while in Mexico to conduct studies. Mexico submits that Exportadora's activities in transporting the Japanese experts is immune "public" activity.

Mexico further submits that the Ninth Circuit's subsequent decision in Sugimoto is inconsistent with this Court's recent opinion in Saudi Arabia v. Nelson, _U.S._, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993) and with the Third Circuit's opinion in Federal Ins. Co. v. Richard I. Rubin & Co., 12 F.3d 1270 (3d Cir. 1993). Those cases explain that courts must consider whether a plaintiff's claims are "based upon" the commercial activity asserted as the basis for jurisdiction. In Nelson, this Court reasoned that the defendants' tortious conduct itself failed to qualify as commercial activity.

Mexico respectfully believes the Ninth Circuit in Sugimoto also improperly created a new exception to immunity by basing jurisdiction on the acts of an independent contractor (i.e., Aviones), which were attributed to Exportadora. This Court in First Nat. City Bank v. Banco Para El Com., 462 U.S. 611, 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983) discouraged such an approach to jurisdiction explaining that separate legal personalities are "an almost indispensable aspect of the public corporations."

Finally, this case provides the Supreme Court with an opportunity to define the "substantial contact" element of the FSIA's commercial activity exception. In Nelson, the Court expressly left the question for another day.

ARGUMENT

In considering immunity of foreign states, this Court explained that "subject-matter jurisdiction of the lower federal courts is determined by Congress, 'in the exact degrees and character which to Congress may deem proper for the public good.'" Argentine Republic v. Amerada Hess, 488 U.S. 428, 433, 109 S.Ct. 683, 102 L.Ed.2d 818, 827 (1989), quoting Cary v. Curtis, 3 How. 236, 245, 11 L.Ed.2d 576 (1845). The FSIA provides the exclusive standards for resolving immunity

questions raised by sovereigns in United States courts. House Report No. 94-1487, reprinted in 1976 U.S. Code Cong. and Admin. News, p.12. (House Report).

The FSIA codifies the "restrictive theory" of immunity, under which foreign sovereigns are absolutely immune from liability for suits involving public acts, but not those involving the foreign state's commercial activity. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 487, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983).

I. THE FSIA GRANTS IMMUNITY TO SOVEREIGNS ENGAGED IN PUBLIC ACTIVITY

In analyzing immunity since the adoption of the FSIA, courts first determine whether the foreign sovereign's activity was public or commercial. A state engages in commercial activity only where it acts as a private person in the market and exercises powers that also can be exercised by a private person. Saudi Arabia v. Nelson, 507 U.S. __, 60, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993).

In this case, Exportadora's activity as to Sugimoto and Kodani can best be described as transporting scientists at the direction of the government to fulfill Mexico's agreement with Japan concerning technical cooperation. The activity is not commercial because private persons do not undertake to transport foreign scientists to fulfill an international agreement.

The Ninth Circuit in Schoenberg, however, reasoned that an activity is public and noncommercial if only a sovereign state can perform it and that the activity is commercial if it is of the type customarily carried on by an individual for profit. Schoenberg, 930 F.2d. at 780. The Schoenberg court then concluded:

> Exportadora arranged transportation for [Sugimoto and Kodani] at the behest of its majority stockholder, the Mexican government. Appeasing one's majority stockholder is an activity that a private entity can perform...

Id. In reaching its conclusion, the Schoenberg court relied on the elusive test that the commercial character of an activity is determined by reference to the *nature* of the conduct and not to its *purpose*. Id. Although the court acknowledged the scientists had a public purpose at their destination, that was found to be irrelevant, and instead the court focused on the transportation and found it to be commercial in nature.

Mexico starts with the proposition that it, most certainly, would not have been engaged in commercial activity had it transported the scientists itself, because both the nature and purpose of its activity would have been public. Mexico would have been providing transportation to scientists pursuant to a formal agreement with Japan. It naturally follows that Exportadora was not engaged in commercial activity when it fulfilled the government's public obligation when directed to do so. Cf. Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371 (5th Cir. 1980).

Mexico believes the Ninth Circuit's opposite conclusion resulted, in part, from the difficulty courts face in distinguishing the *purpose* of an activity from its *nature*. The Supreme Court has recognized the problem, but acknowledged that the FSIA commands courts to observe the distinction. Saudi Arabia v. Nelson, 507 U.S. ___, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993); Republic of Argentina v. Weltover, 504 U.S. ___, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992).

In grappling with this issue, the Court in Weltover offered direction by explaining that:

> [T]he question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are of the *type* of actions by which a private party engages in "trade and traffic or commerce [cites]."

Id., 119 L.Ed. at 405 (emphasis in original).

The Ninth Circuit's reasoning in Schoenberg conflicts directly with Nelson and Weltover. As quoted above, the Schoenberg court stated that an activity is public if it is one that only a sovereign state can perform, and that it is commercial if it is of the type an individual would carry on for profit. Schoenberg, 930 F.2d at 780. The Supreme Court, on the other hand, held that the question is not whether the sovereign is acting with a profit motive or to fulfill a uniquely sovereign objective.

In applying instead the Supreme Court's test, Mexico submits that Exportadora's transportation of the scientists to satisfy Mexico's obligation under an international agreement, is not the type of action by which private parties engage in trade and traffic or commerce. Private parties do not provide air transportation to scientists who happen to be conducting experiments on adjacent property.

Mexico urges the Supreme Court to address, as well, what Mexico perceives as an inclination by some courts to treat foreign government-owned corporations as commercial businesses for all purposes.

Public enterprises are essential to developing countries. Justice O'Connor explained in a different context, that public entities in the form of development

corporations are essential to economic progress in underdeveloped countries. First Nat. City Bank v. Banco Para El Com., 462 U.S. 611, 625, 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983) (Bancec). As Bancec notes, in more desperate times, the U.S. also relied on public corporations such as the Tennessee Valley Authority.

While Exportadora might be one of the world's largest salt producers, a point of questionable relevance that plaintiffs' counsel repeatedly raises, it also is part of an economy that cannot absorb damages such as those allowable in a dynamic economy like California's. If Mexico is to prosper and to generate an economy that will encourage more of its citizens to remain at home and not seek a better life enjoyed in the United States, a now politically-charged issue, Mexico's definition of appropriate governmental activity should be respected. Mexico believes that the characterization of Exportadora's activity as commercial usurps Mexico's right to determine for itself how best to fulfill its international agreements entered to promote the common good of its people.

The Agreement of Technical Cooperation entered between Mexico and Japan should eliminate any doubt that Exportadora's activity as to Sugimoto and Kodani was public. Exportadora should have been allowed the opportunity to introduce this evidence at trial.[1] Regardless, Mexico asks the Supreme Court to take judicial notice of the agreement, an authenticated copy of

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[1]Subject matter jurisdiction over Exportadora turns on the existence of an exception to sovereign immunity. Verlinden, 461 U.S. 480, 493-494 & fn. 20. Objections to subject matter jurisdiction may be raised at any stage of the proceedings, including in the Supreme Court. See, e.g., Sosna v. State of Iowa, 419 U.S. 393, 395-396 & fn. 2, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975). An issue not addressed below, even if not of a jurisdictional nature, may also be addressed by the Supreme Court when it involves national policy concerning foreign relations. Banco Nacional De Cuba v. Sabbatino, 376 U.S. 398, 407-408, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964).

which is included in Mexico's Appendix to Brief of Amicus Curiae.

II. THE SUPREME COURT SHOULD TAKE JUDICIAL NOTICE OF MEXICO'S RECORDS OR REMAND THE CASE

Counsel has not located any case on appeal from a circuit court where the Supreme Court has taken judicial notice of a foreign statute. However, in a case on appeal from a state court, the Supreme Court took judicial notice of a declaration of Russia's Commissariat for Justice. U.S. v. Pink, 315 U.S. 203, 217-221, 62 S.Ct. 552, 86 L.Ed. 796 (1941). The Court considered the official declaration because it could take the same judicial notice available to the state court pursuant to a provision of the New York Civil Practice Act which allowed judicial notice of foreign law at any stage of the proceedings. Id. at 220-221. Both the Federal Rules of Civil Procedure (Rule 44.1) and the California Code of Evidence (§§ 452(f) & 453) have similar statutes.

Rule 44.1 allows a district court determining foreign law to consider any relevant material or source, whether submitted by a party or admissible under the Federal Rules of Evidence, as long as the party gives reasonable notice in writing. The written notice need not be in the pleadings and may be given at any stage in the proceeding. Notes Of Advisory Committee On Rule of Civil Procedure 44.1. Judicial notice has been permitted by this Rule in a number of cases[2], even when the issue

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[2] See, e.g., In the Matter of Fotochrome, Inc., 377 F.Supp. 26, 29 (E.D. N.Y. 1974), aff'd., 517 F.2d 512 (2nd Cir. 1975)(Japanese Code of Civil Procedure); Mongold v. Commissioner, 43 T.C.M. (CCH) 117, T.C. Memo 1981-715; T.C. Mem. (P-H) 810715 (United States Tax Court 1981)(Mexican criminal code); Ramirez v. Autobuses Blancos Flecha Roja, S.A. de C.V., 486 F.2d 493, 497 (5th Cir. 1973)(unauthenticated Mexican civil code).

of foreign law arose after trial or on appeal.[3]

Without Rule 44.1, the Supreme Court also has consistently used judicial notice to consider federal and state statutes and administrative rules and regulations, even when they were not relied on at trial.[4] The Supreme Court has consulted Mexican archives *sua sponte* to settle land disputes. Romero v. The United States, 68 U.S. 721, 1 Wall 721, 17 L.Ed 627 (1864). Mexico requests that if the Court does not take judicial notice of the agreement, it should remand this case to the district court for judicial notice under Rule 44.1.

III. PLAINTIFFS' CLAIMS ARE NOT BASED UPON EXPORTADORA'S COMMERCIAL ACTIVITY IN THE UNITED STATES

The third Japanese passenger on the Aviones flight, Omachi, was a purchasing agent for Asahi Chemical Company of Japan, who had asked permission to visit Exportadora's facility.

Because Exportadora was not engaged in any public activity as to Omachi, Exportadora's immunity also must be evaluated in the context of th ommercial activities exception alleged by plaintiffs as the basis of jurisdiction. See, 28 U.S.C. § 1605(a)(2). That section states:

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[3] .See, e.g., Mila v. District Director Of Denver Colorado District of the INS, 494 F.Supp. 998, 999 (D. Utah, C.D. 1980), rev'd. on other grnds., 678 F.2d 623 (10th Cir. 1982), cert. den., 459 U.S. 1104, 1035 S.Ct. 726, 74 L.Ed.2d 952 (1983) (the adoption laws of the island of Tonga although they were not before the Board of Immigration Appeals hearing below); Curtis v. Beatrice Foods Co., 481 F.Supp. 1275, 1285 (S.D. N.Y. 1980)(the Columbian Labor Code although materials were not presented until after trial).

[4] See, e.g., Lilly v. Grand Trunk Western Railroad Company, 317 U.S. 481, 488-489, 63 S.Ct. 347, 87 L.Ed. 411 (1943); Fourth National Bank Of The City Of New York v. Francklyn, 120 U.S. 747, 751, 75 S.Ct. 757, 30 L.Ed. 825 (1887).

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case --
>
> * * * * *
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; ...

Mexico finds it significant that two panels of the Ninth Circuit in analyzing plaintiffs' complaints arrived at different conclusions as to the basis alleged for jurisdiction -- even though both panels were evaluating the allegations in the context of the same exception to immunity. The Schoenberg court held that arranging transportation for the passengers through Exportadora's San Diego office was the relevant activity for jurisdictional purposes of plaintiffs' tort claims.

After the trial and before briefing commenced in the Sugimoto appeal, this Court issued its opinion in Saudi Arabia v. Nelson, 507 U.S. ___, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993). In Nelson, this Court explained that a plaintiff's claim must be directly "based upon" the commercial activity alleged for the exception to immunity to apply. The opinion clarifies that the commercial activity alleged as the basis for jurisdiction under the FSIA, must include "those elements of a claim that, if proven, would entitle a plaintiff to relief." Id. 123 L.Ed.2d at 59.

Because plaintiffs' wrongful death claim is not based upon the arrangement of transportation through Exportadora's San Diego office, jurisdiction was raised again in the Sugimoto appeal. Instead of directing that the case be dismissed because plaintiffs' claims are not based upon the commercial activity as found by the Schoenberg court on the previous appeal, the Ninth Circuit in Sugimoto held that "Exportadora was engaged in commercial activity in the United States when the air

taxi flew in United States airspace ..." Sugimoto, 19 F.3d at 1311. By basing jurisdiction on a ground that was never addressed in the district court, the Ninth Circuit found jurisdiction over Exportadora.

This holding is erroneous and should be reversed. First, the plaintiffs never alleged that jurisdiction arose from Aviones' brief flight into United States airspace. Second, as discussed below, the Ninth Circuit's analysis of the relevant commercial activity is at odds with this Court's opinion in Nelson. Finally, as further discussed below, jurisdiction was exerted over Exportadora only because the Sugimoto court first imputed Aviones' negligence to Exportadora. This is the first known case where the commercial activities of a third party have been attributed to a foreign sovereign as a basis for jurisdiction under the commercial activities exception.

A. Plaintiffs' Tort Claims Do Not Support Jurisdiction Under the Commercial Activities Exception

The plaintiffs in Nelson also alleged the commercial activities exception as the basis for jurisdiction over their tort claims. This Court explained, however, that the plaintiffs did not allege breach of contract, but personal injuries, and that the torts and not the commercial activities that preceded the torts formed the basis of the suit. Nelson, 123 L.Ed.2d at 59. The Court held that tortious conduct "fails to qualify as 'commercial activity' within the meaning of the Act,..."

In this case, the plaintiffs allege pilot negligence as the basis of their claims. It is the activity that, if proven, would entitle plaintiffs to relief under their theory of the case. See id. 123 L.Ed.2d at 59. The plaintiffs' claims, therefore, are "based upon" pilot error, and not Exportadora's commercial activities that may have preceded the accident. In this regard, the Nelson

opinion cautioned that the conduct upon which a plaintiff's claims are based must present more than "a mere connection with, or relation to, commercial activity." Id. The Court found that while the Saudi government's recruitment and employment of the plaintiff constituted the activities that led to the tortious conduct, they were not in themselves the basis for the plaintiff's suit.

Similarly, although Exportadora hired Aviones in Mexico to transport the plaintiffs' decedent, those activities merely "led to" the eventual accident, and did not form the "basis" for the suit. Exportadora's commercial acts, in themselves, entitle the plaintiffs to nothing under their theory of the case. See id. 123 L.Ed.2d at 59.

The Third Circuit is the only other circuit court since Nelson to consider whether tort claims support jurisdiction under the first clause of the commercial activities exception. See, Federal Ins. Co. v. Richard I. Rubin & Co., Inc., 12 F.3d 1270 (3rd Cir. 1993). In Federal Insurance, various plaintiffs attempted to hold two Dutch government-owned corporations liable for personal injuries resulting from a fire in a building in Philadelphia owned by subsidiaries of the corporations. The Dutch corporations had created the subsidiaries to invest in and manage the property. The plaintiffs argued that their claims were based upon these commercial acts.

The Federal Insurance court, consistent with Nelson, found that the plaintiffs' claims were based upon allegations of negligence, recklessness, nuisance, and strict liability. Id. at 1289. The court held that the claims were not "based upon" the defendants' commercial activity, since that was irrelevant to the plaintiffs' tort claims. Similarly, the plaintiffs' claims in this case are "based upon" allegations of pilot error for which Exportadora is alleged to be vicariously liable. The only

commercial act undertaken by Exportadora was in contracting for the flight -- which occurred in Mexico, and does not form the "basis" of the plaintiffs' suit.

B. The Aviones Flight Should Not Be Imputed to Exportadora as a Basis for Jurisdiction

Even if "commercial activity" can take the form of "tortious flying," as the Ninth Circuit held in Sugimoto, this act was carried on in the United States by Aviones, not Exportadora. Therefore, the plaintiffs' claims are not based on any commercial activity of Exportadora. The Ninth Circuit in Sugimoto, however, found that, "Exportadora was engaged in commercial activity within the United States when the air taxi [Aviones] flew in United States air space,..." Sugimoto, 19 F.3d at 1311.

Exportadora and Aviones are separate juridical entities. The Ninth Circuit acknowledged Aviones was an independent contractor, yet the court never explained why the commercial acts of a separate entity should be imputed to a foreign sovereign for jurisdictional purposes. It appears the court relied on principles of vicarious tort liability that it used to attribute Aviones' liability to Exportadora.[5] Whether jurisdiction over a foreign sovereign can rest on principles of "vicarious liability," however, is an issue that seems germane only to the noncommercial tort exception (28 U.S.C. § 1605(a)(5)) and not the commercial activities exception.[6]

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[5]The court separately analyzed, later in the opinion, Exportadora's tort liability for the acts of Aviones, the independent contractor.

[6]The noncommercial tort exception, however, was not factually developed in the district court, nor was it relied on by the Ninth Circuit in either Schoenberg or Sugimoto. It is doubtful that jurisdiction would exist under the noncommercial tort exception, because the language of § 1605(a)(5) is specifically limited to cases involving torts committed by the sovereign's officials and employees.

By contrast, no such theory of "vicarious commercial acts" has ever been developed, or can be said to have ever existed, within our system of jurisprudence; this is an issue arising solely within the context of the commercial activities exception of the FSIA. The Ninth Circuit in Sugimoto unwittingly developed this unprecedented expansion in our law, and erred in doing so. Indeed, the Ninth Circuit's earlier opinion in Schoenberg expressly avoided the issue of vicarious liability, finding that it was an issue which had no bearing on jurisdiction under the commercial activities exception. See Schoenberg, 930 F.2d at 782 n.3.

In attributing the commercial acts of Aviones to Exportadora, the Sugimoto court also failed to heed the separate juridical status of these entities in accordance with this Court's cautionary words in First National City Bank v. Banco Para El Com. (Bancec), 462 U.S. 611, 103 S. Ct. 2591, 77 L. Ed. 2d 46 (1983). Bancec urged a restrained approach in imputing liability, much less jurisdiction, to separate foreign juridical entities. Although Bancec involved the attribution of substantive liability, it has provided guidance to courts in determining the attribution of jurisdiction under the commercial activities exception. See, e.g., Federal Ins. Co. v. Richard I. Rubin & Co., Inc., 12 F.3d 1270, 1287 (3rd Cir. 1993); Walter Fuller Aircraft Sales, Inc. v. Republic of Philippines, 965 F.2d 1375, 1382 (5th Cir. 1992).

The circumstances in Federal Insurance are analogous to those in the present case in considering whether jurisdiction may be imputed to a foreign sovereign under the commercial activities exception. The Federal Insurance court identified the relevant commercial activity as "the formation of two wholly owned Dutch subsidiaries" -- activity not directly undertaken in the United States -- and held that the district court erred in

attributing the acts of the subsidiaries to the parent corporations as a basis for jurisdiction. Id. at 1286.

First Insurance therefore directs that the commercial acts of one entity inhere to that entity alone and may not be attributed to another, no matter how closely related, to establish jurisdiction under the commercial activities exception. Since Exportadora and Aviones are not related foreign instrumentalities, but are separate legal entities, jurisdiction based on the attribution of Aviones' commercial acts is more tenuous.

IV. THE COMMERCIAL ACTIVITY RELIED ON FOR JURISDICTION DID NOT HAVE SUBSTANTIAL CONTACT WITH THE U.S.

This Court in Nelson expressly left open the issue of what constitutes "substantial" activity under section 1603(e) of the FSIA. Nelson, 123 L.Ed.2d at 58. The FSIA itself provides little guidance in defining the term "substantial." The examples in the FSIA's legislative history contemplate only the execution of commercial transactions, indicating that Congress may not have envisaged the burgeoning efforts of plaintiffs to base personal injury claims on the slightest commercial activity conducted in the United States. Nevertheless, the plain meaning of the term "substantial" means "[o]f real worth and importance.... [s]omething worthwhile as distinguished from something ... merely nominal." Black's Law Dictionary (6th ed. 1990). Cf. Saudi Arabia v. Nelson, 123 L.Ed.2d at 58-59 ("Although the Act contains no definition of the phrase 'based upon,' and the relatively sparse legislative history offers no assistance, guidance is hardly necessary") citing Black's Law Dictionary (6th ed. 1990).

Whatever the significance of the actual aircrash, the commercial activity did not have "substantial contact" with the United States to justify the exercise of

jurisdiction pursuant to the commercial activities exception. The air taxi's commercial contact with the United States was not "substantial" within the ordinary meaning of that word, since it was only a brief intrusion into U.S. airspace. Otherwise, jurisdiction could be based on the most *de minimis* contacts, contrary to the meaning of the term "substantial," and contrary to the Constitutional mandate that personal jurisdiction comport with due process notions of "fair play and substantial justice." International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L.Ed.2d 95 (1945).

The exceptions for exercising jurisdiction under the FSIA track the Constitutional requirements for in personam jurisdiction.[7] It appears that the first clause of the FSIA tracks the requirements for exercising "specific jurisdiction,"[8] in which the plaintiff's claim must be "based upon," or "arise out of" a "substantial connection" with the forum state. See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475, 105 S.Ct. 2174, 85 L.Ed.2d 528, 542 (1985); McGee v. International Life Ins. Co., 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957). The FSIA cannot require a lesser showing without violating Exportadora's rights to due process.

In McGee, the Court found that the defendant's contacts with the forum state were "substantial," where the defendant had deliberately solicited insurance from California residents, and because the contract was delivered in California and all payments were made from California. The defendant had "purposefully availed"

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[7] See, e.g., House Report at 13, stating that the immunity provisions of the FSIA require "some connection with the lawsuit and the United States," and "prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction."

[8] See Helicopteros Nacionales de Colombia, S.A. v. Hall, 444 U.S. 408, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984)(discussing distinction between general and specific jurisdiction).

itself of the benefits of California's law. This Court has explained that "purposeful availment"

> [E]nsures that a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts [cites], or of the "unilateral activity of another party or a third person. [Cite]. Thus where the defendant "deliberately" has engaged in significant activities within a State [cite], or has created "continuing obligations" between himself and residents of the forum [cite], he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by "the benefits and protections" of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.

Burger King Corp. v. Rudzewicz, 471 U.S. at 475-76, 105 S.Ct. 2174, 85 L.Ed.2d at 542-43.

Under this analysis, jurisdiction over Exportadora is improper. Exportadora's activities were not "purposefully" and "deliberately" directed to California when it hired the air taxi that fortuitously flew into U.S. airspace, nor could Exportadora have foreseen that the air taxi would enter U.S. airspace. Moreover, due process requires that the contacts "proximately result from actions by the defendant himself," and not by the "unilateral actions of a third person." Burger King Corp. v. Rudzewicz, 471 U.S. at 475-76, 105 S.Ct. 2174, 85 L.Ed.2d at 542-43 (emphasis in original).

CONCLUSION

The Ninth Circuit's decision in Sugimoto threatens to expand jurisdiction over foreign sovereigns in United

States courts and to undermine the intent of Congress in enacting the FSIA to establish uniform law, by creating a new exception to immunity that would derive from state laws for attributing liability of third parties to foreign entities. As a separate issue of equal significance, the unique proceedings in this case eliminated Exportadora's ability to establish that its activity was "public" and not "commercial" in fulfilling Mexico's governmental obligations to Japan. Mexico respectfully urges the Court to grant certiorari for this case allowing comprehensive briefing on the issues of far reaching international significance.

Respectfully submitted,

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